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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARCUS D. BENNING, Plaintiff and Appellant, v. WAWANESA GENERAL INSURANCE COMPANY, Defendant and Respondent.	D058442 (Super. Ct. No. 37-2008-00088585-CU-BC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Steven R. Denton, Judge. Affirmed.

Marcus Benning appeals an order denying him attorney fees after he prevailed in his action against his auto insurer, Wawanesa General Insurance Company (Wawanesa), for breach of contract and breach of the implied covenant of good faith and fair dealing (implied covenant). Benning contends the court abused its discretion by finding he is not entitled to (1) private attorney general fees (Code Civ. Proc., § 1021.5)[1] because the

1 Further statutory references are also to the Code of Civil Procedure unless otherwise specified.

action did not confer a significant benefit on the public and there was no financial burden associated with private enforcement; (2) fees as tort damages under *Brandt v. Superior Court* (1985) 37 Cal.3d 813 (*Brandt*), for proving entitlement to policy benefits; and (3) fees incurred in proving the truth of matters set forth in requests for admissions (RFA's) (§ 2033.420). We find no merit to the contentions and affirm the order.

BACKGROUND

Benning owned a 2005 Infiniti G35 Sedan, which he insured through Wawanesa. In December 2005 the car sustained significant damage when it was struck by another car in a hit-and-run accident. The policy gave Wawanesa the discretion to repair or replace the car. It provided: "Our limit of liability for any loss will be the lesser of the: [¶] 1. Actual cash value of the stolen or damaged property, minus the deductible; or [¶] 2. Amount necessary to repair or replace the property with other property of like kind and quality, minus the deductible."

Before the accident Benning's car was worth $37,000. A repair shop estimated repairs at $19,608.38, and Wawanesa elected to repair the car. During the repairs, the shop estimated another $10,274.73 in work was required. The repairs ultimately totaled $30,383.11.[2] Benning paid a $500 deductible and Wawanesa paid the remainder.

Benning sued Wawanesa for breach of contract and breach of the implied covenant. The complaint alleged Wawanesa wrongfully refused to deem the car a total

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2 Under California law, a vehicle is generally deemed a "total loss" if the cost of repairs exceeds its predamage retail value. (*Martinez v. Enterprise Rent-A-Car Co.* (2004) 119 Cal.App.4th 46, 56.)

loss even though it sustained major structural damages that made repair unreasonable and impracticable, and after repairs the car was not returned to its original condition or a safe condition.

In a special verdict the jury found Wawanesa liable for breach of contract. The parties previously stipulated that any breach of contract damages were $24,000. On that amount, the court awarded interest of $10,246. The jury also found Wawanesa breached the implied covenant, but it found the breach did not cause Benning any emotional distress damages. The jury also found Wawanesa did not act with oppression, malice, or fraud, and thus it awarded no punitive damages. The court found the special verdict ambiguous, and treated it as awarding the same $24,000 on both the breach of contract and breach of the implied covenant causes of action.

Benning brought a postjudgment motion for attorney fees under (1) section 1021.5, the private attorney general statute; (2) *Brandt, supra,* 37 Cal.3d 813, for proving entitlement to policy benefits; (3) and section 2033.420 for costs of proof associated with Wawanesa's denial of RFA's. In support, Benning's attorney, Montie Day, submitted an invoice for $269,000 in fees. Benning reduced his fee request to $250,000, but he requested private attorney general fees of $500,000 based on a multiplier of two. The trial court denied Benning's motion in its entirety.

DISCUSSION

I

Section 1021.5

A

"Embodied in . . . section 1021, the 'American rule' states that except as provided by statute or agreement, the parties to litigation must pay their own attorney fees." (*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1257 (*Essex*).) Section 1021.5 is a statutory exception to the American rule. "Section 1021.5 codifies the private attorney general doctrine adopted by the California Supreme Court in *Serrano v. Priest* (1977) 20 Cal.3d 25. [Citation.] ' " 'The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]' [Citation.] Entitlement to fees under section 1021.5 requires a showing that the litigation: '(1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) [was necessary and] imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter.' [Citation.]" [Citation.] In short, section 1021.5 acts as an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to

bring.' " (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 891.)[3]

" 'The trial court's determination regarding the above noted three criteria of section 1021.5 lies within the court's discretion. [Citation.] The trial court is to assess the litigation realistically and determine from a practical perspective whether these criteria have been met.' " (*Center for Biological Diversity v. County of San Bernardino, supra,* 185 Cal.App.4th at pp. 891-892.)

" 'On appeal, we review the trial court's decision for abuse of discretion. [Citation.] "In reviewing the trial court's decision, we must pay ' "particular attention to the trial court's stated reasons in denying or awarding fees and [see] whether it applied the proper standards of law in reaching its decision." ' [Citation.]" [Citation.] We will not disturb the trial court's ruling absent a showing that there is no reasonable basis in the record for the award. [Citations.] "Particularly in a case such as this, fully briefed and argued before the same trial court which heard [the trial], this is not an insignificant point." ' [Citations.] It is the appellant's burden to establish an abuse of discretion." (*Center for Biological Diversity v. County of San Bernardino, supra,* 185 Cal.App.4th at p. 892.)

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3 Section 1021.5 provides in part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

B

The court's order states Benning is not entitled to fees under section 1021.5 "because a significant benefit was not conferred on the general public." Benning claims the court erred as a matter of law by not considering that under the statute the benefit may also be conferred on a "large class of persons." (§ 1021.5.)

We presume, however, that the court considered the "large class of persons" language in section 1021.5. " 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) As discussed *post*, the evidence supports a finding this action does not confer a benefit on a "large class of persons."

Further, Benning's reliance on *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911 (*Notrica*), for the proposition section 1021.5 applies here is misplaced. In *Notrica*, an employer sued the State Compensation Insurance Fund (the Fund) for breach of the implied covenant of good faith and fair dealing, and unfair business practices (Bus. & Prof. Code, § 17200) pertaining to its case reserve and claims handling policies and practices. The Fund was the state's largest workers' compensation carrier, and it had issued policies to 250,000 California employers. The jury awarded the plaintiff $478,606 in compensatory damages and $20 million in punitive damages based on fraud. The trial court enjoined the Fund under Business and Professions Code section

17200 from various business practices and awarded the plaintiff more than $300,000 in attorney fees under section 1021.5. (*Notrica*, *supra*, at pp. 918, 920, 954.) The appellate court granted a new trial on the amount of punitive damages, but it affirmed the judgment in other respects. (*Id.* at pp. 954, 956.) The court rejected the Fund's argument the plaintiff "did not enforce a right of sufficient strength or societal importance to merit the award" (*id.* at pp. 954-955), explaining the "breadth of the injunction, which affects [the Fund's] business practices as they relate to some 250,000 employers, belies this theory." (*Id.* at p. 955.) *Notrica* is distinguishable, as Benning did not seek or obtain any equitable injunctive or declaratory relief.

We also disagree with Benning's assertion the special verdict confers a global benefit on insured's because it puts insurers on notice they will be subject to bad faith liability if they continue to rely on *Ray v. Farmers Ins. Exchange* (1988) 200 Cal.App.3d 1411 (*Ray*), in electing to repair rather than replace seriously damaged vehicles. In *Ray*, the insured (Ray) sued the insurer (Farmers) for breach of contract and breach of the implied covenant, alleging Farmers was obligated "to compensate Ray, after repair of his wrecked car, for the car's diminution in market value because of its status as a wrecked car." (*Id*. at p. 1413.) Ray lost at the trial court, and the Court of Appeal affirmed, explaining "the policy unambiguously gave Farmers the right to elect to repair Ray's vehicle if the cost to repair to 'like kind and quality' was less than the actual cash value of the vehicle at the time of loss." (*Id*. at p. 1416.) The appellate court rejected Ray's theory that the term "like kind and quality" was the equivalent of "actual cash value" at the time of loss. (*Id.* at p. 1417.) The trial court relied on this court's opinion in *Owens v. Pyeatt*

(1967) 248 Cal.App.2d 840, which held that an insurer's election to repair is conclusive "provided the repair places the automobile substantially in its preaccident condition. If it does not, then the automobile is deemed a total loss and the insurer is liable for the preaccident value of the car." (*Ray*, *supra*, 200 Cal.App.3d at p. 1417, citing *Owens v. Pyeatt*, *supra*, at p. 849.)

The special verdict sheds no light on Benning's theory of recovery. We are unable to ascertain how Benning presented his case, or how the jury was instructed, because the joint appendix excludes the trial proceedings. More importantly, a superior court judgment is not precedential authority and the judgment here does not affect *Ray*. Notably, *Hibbs v. Allstate Ins. Co.* (2011) 193 Cal.App.4th 809 (*Hibbs*), was originally published more than nine months after the judgment was entered here and it relies on *Ray* for its holding that the insurer there "was under no obligation to pay the full market value" of a seriously damaged van when the policy provided for the election of repair. (*Hibbs*, *supra*, 193 Cal.App.4th at p. 821, citing *Ray*, *supra*, 200 Cal.App.3d at pp. 1417-1418.) *Ray* pertains to the interpretation of an insurance policy, which is a question of law for the court. (*State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 577.)[4]

"[T]o determine whether a 'significant' benefit has been conferred, the court must determine both the significance of the benefit and the size of the class receiving benefit,

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4 We need not and do not reach the issue of whether we agree or disagree with the *Ray* and *Hibbs* opinions.

from a realistic assessment, in light of all the pertinent circumstances of the gains which have resulted in the particular case." (*Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, 50.) Benning has not shown the action confers any significant benefit on the general public *or* a large class of persons, and thus the court's ruling is proper. No new law has been established.[5]

II

Brandt Fees

A

Next, Benning contends the court erred by disallowing fees under *Brandt, supra,* 37 Cal.3d 813. In *Brandt,* our high court held: "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort. [Citation.] These fees must be distinguished from recovery of attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself." (*Id* at p. 817.)

In *Essex*, *supra*, 38 Cal.4th 1252, the court explained the "*Brandt* rule is now a well-settled but narrow exception to the general rule that each party to litigation must pay its own attorney fees." (*Essex,* at p. 1259.) The court confirmed that "[i]n a tort action

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5 Given our holding on the significant benefit criterion of section 1021.5, we are not required to address the court's alternative finding that the financial burden criterion of the statute was also unmet.

for wrongful denial of policy benefits, *Brandt* allows the insured to recover as tort damages only the attorney fees incurred to obtain the policy benefits wrongfully denied. [Citation.] But attorney fees expended to obtain damages exceeding the policy limit or to recover other types of damages are not recoverable as *Brandt* fees. [Citations.] This follows from the rationale of *Brandt*: The tort of bad faith against the insured entitles the insured to recover the policy benefits *in full*, undiminished by attorney fees, but not to recover attorney fees in general. Allowing recovery of attorney fees incurred to obtain damages beyond the policy limit or to obtain punitive damages would allow the insured to recover attorney fees as attorney fees, violating the American rule." (*Id*. at p. 1258; *Track Mortgage Group, Inc. v. Crusader Ins. Co.* (2002) 98 Cal.App.4th 857, 867 (*Track*) [court may not award fees expended in proving insurer's bad faith].)

In *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780 (*Cassim*), the court explained the proper method for calculating *Brandt* fees in a contingent fee action, such as the instant action. "This method requires the trier of fact to determine the percentage of the legal fees paid to the attorney that reflects the work *attributable to obtaining the contract recovery*. [¶] To determine the percentage of the legal fees attributable to the contract recovery, the trial court should determine the total number of hours an attorney spent on the case and then determine how many hours were spent working exclusively on the contract recovery. Hours spent working on issues jointly related to both the tort and contract should be apportioned, with some hours assigned to the contract and some to the tort. This latter figure, added to the hours spent on the contract alone, when divided by

the total number of hours worked, should provide the appropriate percentage." (*Cassim*, *supra*, 33 Cal.4th at pp. 811-812, italics added.)[6]

Cassim also explains that in either an hourly fee case or a contingency fee case, the amount of fees attributable to an attorney's efforts to obtain policy benefits "could conceivably exceed those benefits entirely." (*Cassim*, *supra*, 33 Cal.4th at p. 809.) This is because "a client paying his or her lawyer an hourly fee may choose to pay more than 40 percent (or even more than 100 percent) of an anticipated contract recovery in order to obtain that recovery. The same is true for a client operating under a contingent fee agreement. Certainly nothing in *Brandt* limits the amount of fees awarded as damages to a percentage of the contract benefits." (*Cassim, supra,* at p. 809.)

"[A]s in any tort case, the plaintiff bears the burden of proving by a preponderance of the evidence both the existence and the amount of damages proximately caused by the defendant's tortious acts or omissions." (*Cassim*, *supra*, 33 Cal.4th at p. 813.) The

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6 *Cassim* gives an example using compensatory damages of $3,594,000 and a 40 percent contingency fee contract, for a fee of $1,437,600 on compensatory damages. *Cassim* explains that if the attorney spent 1,500 hours on the case, and could prove a breakdown of 200 hours on issues related solely to the contract, 500 hours on issues relevant to both the contract and the tort, and 800 hours on issues related solely to the tort, the "trial court could reasonably conclude that half the hours spent on the joint contract/tort issues are fairly attributable to the contract (i.e., half of 500 hours, or 250 hours), and thus 30 percent of the hours worked (200 hours plus 250 hours, divided by 1,500 total hours) is attributable to the contract recovery. Thirty percent of the total legal fee (30 percent of $1,437,600) is $431,280. This is the amount a trial court should award as *Brandt* fees in this hypothetical situation." (*Cassim*, *supra*, 33 Cal.4th at p. 812.) According to a commentator, "No case has yet addressed the appropriate method of allocating between fees incurred on the contract and tort claims in hourly fee cases." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶ 13:129.20, p. 13-38.)

court's ruling on *Brandt* fees is subject to an abuse of discretion standard of review. (*Cassim*, *supra*, at p. 805.) Under this standard, "we have no authority to substitute our own decision for that of the trial court," and "[o]ur inquiry is limited to determining whether the trial court's decision exceeds the bounds of reason." (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 269.)

B

We find no abuse of discretion, because Benning did not satisfy his burden of segregating recoverable fees from nonrecoverable fees. Day's invoice makes no allocation. His declaration states he spent a total of 672.5 hours on the action, and he devoted no more than 10 hours to the emotional distress and punitive damages aspects of the tort claim. Thus, he left 662.5 hours unallocated. As the trial court found, Day's declaration shows the tort aspect of the action was a "primary theme." Thus, it appears likely that he spent a substantial amount of time solely on tort issues, for which no *Brandt* fees are available. Further, the trial court rejected as not credible Day's claim that he spent no more than 10 hours on tort damages issues, and we do not reassess the credibility of witnesses. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915.)

Benning contends *Cassim's* method of calculating *Brandt* fees is inapplicable because it "does not address the situations where, as with vehicle insurance, the actual compensatory damages are more likely to be from $1,000 to $30,000.00, and if punitive damages are awarded, [they] are likely limited to 1-3 times actual damages . . . meaning that the attorney would not recover any reasonable compensation for undertaking the case

despite the wrongful conduct of the insurance company." Benning submits that in such instances, the attorney is entitled to "reasonable compensation" without regard to *Cassim.* Day's declaration claimed entitlement to all fees incurred in proving breach of contract and breach of the implied covenant.

Superior and appellate courts, however, are bound by Supreme Court precedent (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), which unequivocally forecloses an award of fees incurred *solely* in proving the insurer's bad faith, as antithetical to the American rule. (*Brandt*, *supra*, 37 Cal.3d at p. 817; *Essex*, *supra*, 38 Cal.4th at p. 1258; *Cassim*, *supra*, 33 Cal.4th at p. 811.) *Cassim* does not suggest its application is limited to instances of substantial recovery and fees. Rather, it states: "Having found fault with the methods of calculating *Brandt* fees proffered by both parties, we turn to explaining the proper method of calculating such damages in a contingent fee context." (*Cassim, supra,* at p. 811.) *Cassim* also explains that *Brandt* fees are intended to protect the insured, not his or her attorney. (*Cassim, supra,* 33 Cal.4th at p. 810.)[7]

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7 *Cassim* explains: "Focus on the work plaintiff's attorney did in this case, what *Brandt* termed 'the attorney's efforts' (*Brandt, supra,* 37 Cal.3d at p. 819), is thus relevant, but not because he is deserving of some fair measure of compensation for his work. In agreeing to a contingent fee arrangement, he accepted the risk that the recovery would be small or nonexistent. Focus on the attorney's work is relevant instead because, plaintiffs having received a sizeable tort recovery, the 40 percent contingent fee they were required to pay their attorney was also sizeable. To the extent some portion of that legal fee represents legal work that was related to both the tort and the contract recoveries and was thus at least partially '*attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract*' [citation], failure to reimburse plaintiffs for a portion of that shared amount would necessarily diminish their contract recovery and violate

On appeal, Benning asserts the unallocated 662.5 hours are solely or partially attributable to recovering the withheld policy benefits, and thus no further allocation is required. He cannot pursue the theory, however, because he did not raise it at the trial court. (*Estate of Barbikas* (1959) 171 Cal.App.2d 452, 464 ["A party is not ordinarily permitted to adopt one theory in the trial court and change to another theory on appeal."].)

Moreover, the lack of allocation is fatal because time spent solely on contract issues is treated differently than time spent partially on contract issues. "Hours spent working on issues jointly related to both the tort and contract should be *apportioned*, *with some hours assigned to the contract and some to the tort*. This latter figure, added to the hours spent on the contract alone, when divided by the total number of hours worked, should provide the appropriate percentage [of the legal fees attributable to the contract recovery]." (*Cassim, supra,* 33 Cal.4th at p. 812, italics added.) Thus, the plaintiff must segregate time spent on intertwined issues and submit supporting evidence.[8] The

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Brandt's premise that plaintiffs should recover, as tort damages, the legal fees incurred to recover their policy benefits. Accordingly, we reject Allstate's argument that *Brandt* fees in this case should have been limited to 40 percent of the benefits owing under the contract." (*Cassim, supra,* 33 Cal.4th at p. 810.) *Cassim* does not stand for the proposition that a plaintiff is entitled to an undiminished contract recovery by receiving fees for attorney work pertaining *solely* to a tort claim.

8 For instance, in *Cassim, supra,* 33 Cal.4th at page 810, the court concluded: "Substantial evidence supports the claim that many of the legal issues were intertwined. For example, as plaintiffs argued below, in order to prevail both on the contract claim *and* on the tort claim, they were required to refute Allstate's assertion that they were responsible for starting the fire. Similarly, in order to prevail both on the contract claim *and* on the tort claim, the Cassims were required to refute Allstate's position that the

presentation of a lump sum claim for all hours spent on the contract, whether solely or partially, does not permit apportionment.

Additionally, Benning's reliance on *Track, supra*, 98 Cal.App.4th 857, for the proposition that any required allocation was the *trial court's duty*, is misplaced. In *Track*, the plaintiff sought $143,458 in fees expended in compelling payment of $5,876.75 in real property insurance benefits. The plaintiff submitted a supporting "itemized billing with those entries highlighted that it claims were not incurred in obtaining policy benefits." (*Id.* at pp. 864, 867.) In opposition, the insurer argued the plaintiff's "billing system defeats its ability to determine which fees were expended in pursuit of policy benefits." (*Id.* at p. 867) The court reduced the fees to $80,000 in recognition of "the 'near impossibility' of segregating the billing item by item." (*Ibid.*) The plaintiff appealed, and the appellate court found no abuse of discretion since "the trial court that heard the case determined that $80,000 was a reasonable fee for *enforcing the contract* based upon the value and complexity of the case, the experience of counsel and the result." (*Id.* at p. 868, italics added.)

Here, in contrast to the plaintiff in *Track*, Benning made no effort to allocate the attorney hours spent on the action, with the exception of 10 hours Day claimed were spent on emotional distress and punitive damages issues, which the court rejected as not credible. Further, no argument was raised that Day's invoice entries could not be

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policy was void and unenforceable due to their alleged material misrepresentations in submitting falsified receipts for their living expenses. Herzog's [plaintiffs' attorney] failure to prevail on either of these issues would have precluded a recovery on both the contract and the tort causes of action."

segregated, as was the case in *Track.* As a commentator cautions on *Brandt* fees: "If you represent the insured, keep careful time records. You may be handling the case on a contingency fee basis but you are going to need detailed time records to segregate and substantiate any claim for attorney fees as damages." (Croskey et al., Cal. Practice Guide: Insurance Litigation, *supra,* ¶ 13:135, p. 13-39, citing *Cassim, supra,* 33 Cal.4th at p. 813.)

Further, *Cassim* does not suggest the trial court had a duty to allocate fees. In *Cassim,* the court reversed and remanded on a *Brandt* fee issue because "the record fails to indicate that the trial court apportioned legal fees to ensure that the *Brandt* fee award reflected only those fees 'attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract.' " (*Cassim, supra,* 33 Cal.4th at p. 813.) The "trial court apportioned" language in *Brandt* merely acknowledges that it is the court's job to make the ultimate calculation of *Brandt* fees, if any. The language does not affect the plaintiff's burden of proving entitlement to fees.

Benning's reliance on *Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563 (*Campbell*), on the issue of allocation is also misplaced. In *Campbell,* the insured sued for breach of contract and breach of the implied covenant after the insurer refused to honor its promise to pay the insured $2,500 if her car was stolen when equipped with a certain anti-theft device. The insured recovered $2,500 for breach of contract, $7,288 for emotional distress, and $64,417 in punitive damages. (*Id.* at p. 569.) The trial court denied her request for *Brandt* fees, and the appellate court reversed. The insured conceded she was only entitled to fees attributable to the contract cause of action,

she documented that amount to be $13,010, and the insurer did not challenge the amount. (*Id.* at p. 572.)[9] Here, there was a complete failure of proof, and thus Benning cannot reasonably complain that attorney fees will diminish his policy recovery.

Benning also asserts the trial court erred by relying on his original allocation of only 10 hours to tort issues and "overlook[ing] the ultimate proposed allocation in the same declaration." Day's declaration concludes, "Your declarant requests that this Court determine the attorney fees and expenses and set the amount as $250,000, which your declarant believes would allocate $31,259.00 to the 'emotional distress' and 'punitive damage' claim, which is almost 8 times the amount which would be justified by the actual hours (10 hours @ $400 x 8=$32,000)." This did not, however, meet Benning's burden of proving entitlement to *Brandt* fees.

III

Section 2033.420

Section 2033.420, subdivision (a) provides: "If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses *incurred in making that proof,* including reasonable attorney's fees."

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9 *Cassim* notes that the court in *Campbell* abused its discretion to the extent it "awarded *Brandt* fees in excess of the amount of legal fees for the tort and contract recoveries combined." (*Cassim, supra,* 33 Cal.4th at p. 809, fn. 13.)

(Italics added.) "The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial." (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509.)

Subdivision (b) of section 2033.420 provides: "The court shall make this order unless it finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit."

The court denied cost-of-proof sanctions because Benning made "no attempt to allocate fees 'incurred' in proving up the various requests." Benning asserts the ruling constitutes error as a matter of law, because the lack of allocation is not one of the four exceptions set forth in subdivision (b) of section 2033.420.[10] Subdivision (a) of section 2033.240, however, "authorizes only those expenses 'incurred in making that proof,' i.e., proving the matters denied by the opposing party." (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 736-737 (*Garcia*).) Conclusory statements by counsel are not sufficient. (*Id.* at p. 737.) "An accounting is required (e.g., by declarations from moving party's counsel) setting forth the hourly fees and time spent to 'prove' the matters denied . . . as opposed to time spent in preparation for trial generally or in proving other matters

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10 Benning's assertion that the trial court "sua sponte" denied attorney fees under section 2033.420 on the ground of the failure to allocate is erroneous. Wawanesa objected to an award of fees on that ground among others.

at trial of the case generally." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 8:1413.1a, p. 8G-40.)

Benning also asserts allocation was not required because certain of the RFA's asked Wawanesa to admit whether its claims handling constituted breach of contract and breach of the implied covenant. He submits that since those were the ultimate issues in controversy, his entire fee request qualifies as cost-of-proof sanctions. It is true that an RFA "may relate to a matter that is in controversy between the parties." (§ 2033.010.) That does not mean, however, that the propounding party is entitled to all fees incurred in the action. Rather, "expenses and fees incurred before the RFA was denied are not awardable as sanctions under [section] 2033.420." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 8:1405.2, p. 8G-37; *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 638.) Wawanesa responded to the RFA's in mid-October 2009, and Day's invoice claims fees from mid-June 2008.

The determination of whether a party is entitled to expenses under section 2033.420, subdivision (a) is within the trial court's discretion, and on appeal we apply a deferential abuse of discretion standard of review. (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist., supra,* 126 Cal.App.4th at p. 267.) We find no abuse of discretion. To the contrary, an award of all fees requested

without proof they were incurred after RFA's were denied is an abuse of discretion.

(*Garcia, supra,* 28 Cal.App.4th at p. 737.)[11]

DISPOSITION

The order is affirmed. Wawanesa is entitled to costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

MCINTYRE, J.

11 The trial court also relied on alternative grounds in denying Benning attorney fees under section 2033.240. The court determined Wawanesa's responses to five of the 12 RFA's consisted of objections, rather than substantive responses, and Benning forfeited sanctions by not moving to compel further responses; he did not prove the matters set forth in another six of the RFA's; and the remaining RFA was not of substantial importance and Wawanesa had a reasonable basis to deny it. Given our holding, these issues are moot. We are also not required to address Benning's claim for attorney fees on appeal.